MAY 31 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted]100

WATSON BROS. TRANSPORTATION CO., INC.,
Petitioner,

vs.

CENTRAL STATES COOPERATIVES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Watson Bros. Transportation Co., Inc., defendant-appellant, below, by its duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 10, 1950 (R. 222), rehearing denied, April 6, 1950 (R. 223).

In support of this petition, your petitioner respectfully shows:

OPINIONS BELOW.

The District Court did not prepare or publish an opinion. The opinion of the Court of Appeals for the Seventh Circuit is reported in 180 F. (2d) 689, and appears in the record at pages 211-221.

JURISDICTION.

This Court's jurisdiction is evoked pursuant to the Act of June 25, 1948 c. 646, 62 Stat. 928, Title 28 U. S. C. § 1254.

SUMMARY STATEMENT OF MATTER INVOLVED.

The respondent,* Central States Cooperatives, Inc., filed its complaint in the Municipal Court of Chicago against the petitioner Watson Bros. Transportation Co., Inc.* for possession of certain described premises located in Chicago, Illinois. Upon petition of the defendant the cause was removed to the United States District Court. After the removal plaintiff filed its amended complaint for possession of the described premises. The prayer of the complaint seeks solely possession and no other relief (R. 47).

The amended complaint alleges that the defendant held over in the described premises after the expiration on September 30, 1946, of a written lease. The answer of

* For convenience the petitioner is sometimes referred to as the "defendant" and the respondent as the "plaintiff."

the defendant admitted the expiration of the written lease but set forth that by an oral leasing agreement between the parties it was agreed that the defendant could remain in possession from October 1, 1946, to June 30, 1947. The cause was tried to a jury. By reason of its affirmative defense the defendant was required to open with its proof. All of the evidence introduced upon the trial was that of the defendant. No evidence was introduced by the plaintiff. At the conclusion of the evidence the Court directed a verdict in favor of the plaintiff and a judgment was entered upon that verdict awarding a writ of restitution for possession of the premises in favor of the plaintiff.

In support of its affirmative defense the defendant introduced the written lease under which it had been in possession wherein one Charles H. Morse, Jr., was lessor, and the defendant lessee, covering the term from October 1, 1945, to September 30, 1946 (R. 122-129). The lease provided among other things that in the event during the term of the lease the lessor elected to sell the premises the lessee would have the right of first refusal; that is to say, the first opportunity to purchase the premises upon the same terms and conditions as the lessor proposed to sell the premises to any other person, firm or corporation. In the event of any proposed sale the lessor was required to advise the lessee in writing giving the name of the proposed purchaser and the terms, conditions and consideration of the proposed sale. The lessee defendant was to have ten days from the receipt of such notice to purchase the premises upon like terms, conditions and for a like consideration (R. 124-125).

On May 27, 1946, Morse, defendant's lessor, made a contract with the plaintiff to sell the premises in question to the plaintiff. Notice of the proposed sale in accordance with the terms of the lease was given to the defendant by letter dated May 28, 1946 (R. 130-131). On June

6, 1946, within the ten-day period provided for by the lease, William M. Wolfe, Vice President of the defendant, came to Chicago from Omaha and talked to Laurie L. Lehtin, General Manager of the plaintiff. Wolfe asked Lehtin for a lease to continue in the premises and told Lehtin that if he could not get a lease that the defendant would definitely buy the premises in question (R. 96-97). Lehtin told Wolfe that he wanted to think the matter over and told Wolfe to call him back at four o'clock that afternoon. When Wolfe called back and asked Lehtin if he had come to a conclusion as to whether or not he was going to lease the building or whether the defendant was going to buy it, Lehtin said: "I want you to see Mr. Richter." Wolfe asked Lehtin "What do I want to see Richter about? We are dealing on a matter of hours." Lehtin said, "That is all right. You talk to Richter. He is in a position to talk for us" (R. 97-98). Richter is a real estate broker associated with Seay & Thomas Real Estate Company. The following day, June 7, 1946, Wolfe talked to Richter and after discussing the leasing of the premises Wolfe stated that Richter and he agreed that the defendant was under a lease for nine months from the expiration of the existing lease at a rental of $850 per month giving the plaintiff the right to use some of the property. Richter stated that was a deal (R. 103). Wolfe called Richter who told him he was having trouble getting Mr. Lehtin and asked if a letter signed by Mr. McBride of Brenner & McBride, attorneys for the plaintiff, would be satisfactory. Wolfe stated he wanted Richter's signature on the letter (R. 103-4). Wolfe went to McBride's office at noon two minutes before train time on June 8th. Wolfe received a letter from McBride, looked to see if Lehtin's signature was on it, told McBride he was sorry he had a man downstairs waiting for him and he had to run. He was there actually less than a minute.

He did not stop to read the letter or discuss it. He actually first read the letter on the train from Chicago to Omaha (R. 104). The letter did not contain the same terms and provisions that Wolfe and Richter had agreed upon. The letter was written, however, at the request of Mr. Richter (R. 45, 149). The defendant did not exercise its option to purchase the premises in question because of the oral leasing agreement Wolfe had concluded with Richter (R. 112).

The defendant also called in its behalf Laurie L. Lehtin, the General Manager of the plaintiff, to show his status as General Manager of the plaintiff and also introduced certain letters for the limited purpose of supporting the prior oral testimony as to the authority of Richter to act for the plaintiff (R. 111).

It was at the conclusion of the foregoing evidence that the trial judge directed the jury to return a verdict in favor of the plaintiff.

Thereupon the defendant perfected its appeal to the Court of Appeals and on September 23, 1947, during the pendency of such appeal filed in that court its motion for an order to reverse the judgment appealed from and to remand the cause to the District Court with instructions to dismiss the complaint for the reason that there was no longer any actual controversy involving real and substantial rights between the parties but only an abstract and moot question. The motion also requested in the alternative that the judgment be reversed and the cause be remanded with instructions to the District Court to remand the cause to the State Court on the ground that the District Court was without jurisdiction (R. 179-190).

On October 30, 1947, the Court of Appeals entered an order denying the motion of the plaintiff without prejudice to its right to renew the same at the time of the hearing on the merits. Thereupon that court held that the Dis-

trict Court was without jurisdiction. *Central States Co-Ops. v. Watson Bros. Transp. Co.*, 165 F. 2d 392. This holding was reversed by this Court in the light of its decision in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582. This Court's *per curiam* decision is *Central States Cooperatives, Inc.* v. *Watson Bros. Transportation Co., Inc.*, 337 U. S. 951. The cause was remanded for further consideration and the prior judgment of the Court of Appeals vacated.

As appears from the opinion of the Court of Appeals (R. 212) the case was set for oral argument and the defendant renewed its motion, originally denied without prejudice, to reverse and remand with directions that the complaint be dismissed as no actual controversy remained between the parties and there was no subject matter upon which the judgment of the court could operate and that the issue for decision was moot. As stated in the opinion of the Court of Appeals (R. 212) there is no dispute as to the facts relied upon by the defendant in support of its motion. As shown in the original motion the plaintiff on July 14, 1947, sold and conveyed the premises in controversy to Yellow Terminals, Inc., which later company on August 5, 1947, filed in the United States District Court its suit against the defendant for possession of the same premises. By the renewed motion it was further shown that the defendant on December 4, 1947, surrendered possession of the premises in controversy to Yellow Terminals, Inc., and that the latter took possession on said date. It was also shown that plaintiff on February 7, 1948, instituted an action in the Superior Court of Cook County against the defendant to recover for the reasonable rental value of the premises in controversy, statutory double rent, and for other items of damage alleged to have been sustained on account of the defendant's detention of the property.

The Court of Appeals in denying the motion to dismiss the appeal as moot stated that the question posed under the motion is whether the issue in the motion is substantive so that under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 the Illinois law would apply, or whether it was a procedural question calling for the application of the federal law. The Court further stated that based upon the decision of *Heitmuller* v. *Stokes,* 256 U. S. 359, if controlling, would require affirmative action on the motion. The opinion reads:

> "In support of its motion, Watson Brothers cites and relies entirely upon *Heitmuller* v. *Stokes,* 256 U. S. 359. There the court, with a situation before it quite similar to that which now confronts us, held that the question of the right to possession had become moot and it reversed and remanded the cause to the court of original jurisdiction with directions that the complaint be dismissed. The holding in that case, if controlling, would seem to require affirmative action on the motion under consideration. Since then, however, we have had *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, which calls for the invocation of the State rule where substantive rights are affected. The question thus posed is whether the issue on the motion is substantive or procedural. If the former, the rights of the parties must be determined by the Illinois law; if the latter, the *Heitmuller* case, *supra,* governs.
>
> "Watson Brothers contends that there is no subject matter upon which the judgment of the court can now operate. Of course, that is true provided the assertion is limited solely to the right of possession."

After denying the motion to reverse and remand the Court proceeded to a discussion of the merits of the case. On the merits of the case the principal controversy related to whether the defendant had made a valid oral agreement with an authorized representative of the plaintiff. The Court of Appeals found "* * * that no oral agree-

ment was made binding upon Central States, * * *'' (R. 221). In arriving at that conclusion the Court of Appeals attacked the credibility of the evidence of the defendant and drew unfavorable inferences from the evidence against the defendant. The opinion states (R. 221):

> ''Watson Brothers relies on the well known rule that it was on a motion for directed verdict entitled to the benefit of all *favorable inferences* arising from the facts. Assuming it was so entitled, as we think it was, it is our view that the *inescapable inferences do its position more harm than good.* For instance, if Wolfe at the time he claims to have made an oral lease with Richter thought that the latter was authorized to act for Central States, why did he insist that the agreement be signed by Lehtin? The fact that he was not willing to rely upon Richter in this respect indicates that he recognized Richter's lack of authority. More than that, so far as we can ascertain from the record, Watson Brothers first made its claim of an oral lease when its answer was filed in court on November 19, 1946. Its silence during all this time is, so we think, inconsistent with its belated contention that it was relying upon an oral lease. When Wolfe on June 8 received from McBride a letter containing Central States' proposal wholly at variance with the alleged oral lease entered into some twenty-four hours previously, *it taxes our credulity,* in the absence of any protest on his part that *he believed* an oral agreement binding on the parties had been consummated, and the *unfavorable inference arising* from that circumstance is enhanced by the failure of Watson Brothers to respond to or acknowledge receipt of the subsequent letters which it received from Central States. *A further inference against Watson Brothers* arises from the fact that it refused Central States the right to share possession of the premises or to possess any part of the premises, contrary to the alleged oral agreement.'' (Italics supplied.)

QUESTIONS PRESENTED.

I. Whether or not a cause has become moot on appeal so as to require its reversal and remanding is to be determined by the Federal courts from the Federal authorities or whether that question is to be determined under the State law under the ruling of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

II. Whether the defendant has been deprived by the Court of Appeals of its right to trial by a jury where in examining the evidence upon which the trial court directed a verdict against the defendant the Court of Appeals has passed on issues of credibility and has drawn unfavorable inferences against the defendant.

REASONS FOR GRANTING CERTIORARI.

I.

The Court of Appeals Has Decided a Question of General Importance Which Has Not Been But Should Be Settled by This Court; Namely, Whether a Cause Has Become Moot on Appeal Is to Be Determined by the Federal Authorities or by the State Decisions Under the Rule of Erie Railroad Co. v. Tompkins, 304 U. S. 64.

By its decision the Court of Appeals has held that the question as to whether a cause is moot is to be determined under the State law as a substantive question in accordance with the ruling in *Erie Railroad Co.* v. *Tompkins* and not by the Federal authorities (R. 213, 215):

> "In support of its motion, Watson Brothers cites and relies entirely upon *Heitmuller* v. *Stokes*, 256 U. S. 359. There the court, with a situation before it quite similar to that which now confronts us, held that the question of the right to possession had become moot and it reversed and remanded the cause to the court of original jurisdiction with directions that the complaint be dismissed. The holding in that case, if controlling, would seem to require affirmative action on the motion under consideration. Since then, however, we have had *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, which calls for the invocation of the State rule where substantive rights are affected. The question thus posed is whether the issue on the motion is substantive or procedural. If the former, the rights of the parties must be determined by the Illinois law; if the latter, the *Heitmuller* case, *supra*, governs.
>
> "Watson Brothers contends that there is no subject matter upon which the judgment of the court can now

operate. Of course, that is true provided the assertion is limited solely to the right of possession. * * *

* * * * *

"We think that the question presented involves substantive rather than procedural rights. * * *"

This Court has held that a conveyance of premises involved in an action for possession during the pendency of an appeal on the question of the right of possession rendered the controversy moot. This was the decision in *Heitmuller* v. *Stokes,* 256 U. S. 359. The Illinois cases, however, hold to the contrary on the question of mootness of the cause by the conveyance of title during the pendency of an appeal.

In the case of *Heitmuller* v. *Stokes,* 256 U. S. 359, suit was originally brought in the Municipal Court of the District of Columbia for possession of certain described premises and the Municipal Court rendered a judgment in favor of the defendant. The judgment in the Municipal Court was reversed by the Supreme Court of the District of Columbia, which judgment was affirmed in the Circuit Court of Appeals of the District of Columbia, and the cause was then taken by Writ of Error to the Supreme Court of the United States.

During the pendency of the Writ of Error, the defendant in error filed a motion to dismiss the Writ of Error setting forth as grounds for the motion that the cause of action between the parties had ceased to exist by reason of the fact that after judgment of the Court of Appeals, he had sold and conveyed the real estate which was the subject matter of the suit and was therefore not entitled to the relief sought in the action, namely, the possession of the premises, and in addition, that there was no actual controversy involving real and substantial rights between the parties, and no subject matter upon which the judgment

of the court could operate. This Court agreed that since the action was brought to recover possession of real estate, and that the defendant in error had sold the real estate pending the review in the Supreme Court, the case had now become moot. The court said at page 361:

> "As the action was brought to recover the possession of real estate, and as the defendant in error has, pending review in this court, sold it, we agree with the contention that the case has become moot. The plaintiff in error, so far as the record discloses, is in possession, and the defendant in error, having sold and conveyed the property, a judgment if in his favor will not give him possession of the premises. It has been often held that this court will not decide moot cases."

In addition to the fact of a conveyance of property by the plaintiff there was the surrender of possession by the defendant to the plaintiff's grantee in the case at bar (R. 182-187, 199).

The plaintiff cannot be granted any effectual relief. It cannot be restored to possession of the premises.

Under the decisions of this Court if a judgment of the Court would be wholly ineffectual for want of a subject matter on which it could operate, the cause is moot.

In *Brownlow* v. *Schwartz*, 261 U. S. 216, this Court held that it would not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. In the same case the Court laid down the rule to be followed when the cause has become moot on appeal, holding that in such a situation the practice requires that the judgment below be reversed and remanded, with directions to dismiss the bill, complaint or petition. The Court said:

> "This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate.

An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain. * * *

"* * * The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this Court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition."

In *Alejandrino* v. *Quezon*, 271 U. S. 528, 535, the court said:

"The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this Court, vacate the judgment below and remand the cause with directions to dismiss the petition without costs to either party."

In *Gulf, Col. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 508, the Court said:

"Almost from the beginning it has been the settled rule in this court that when, pending a writ of error to a lower Federal court, and without the fault of the defendant in error, an event occurs which renders it impossible, if the case was decided in favor of the

plaintiff in error, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the writ."

The ruling of the Court of Appeals is directly contrary to the constitutional requirement of Article III, Section 2, limiting the jurisdiction of the Federal courts to "controversies." Admittedly in the cause before the Court the complaint and judgment are limited solely to the right of possession of the premises which is the subject matter of the suit. Admittedly the plaintiff voluntarily conveyed the premises during the pendency of the appeal in the Court of Appeals and admittedly the grantee of the plaintiff during the pendency of the appeal has taken possession of these premises (R. 213).

Under these circumstances further proceedings upon the merits of the right to possession by the plaintiff cannot be held in this Court nor in the court below. The cause being moot there is no longer a controversy within the requirements of the constitutional provisions relating to jurisdiction of the Federal Courts.

The issue presented is Federal and is not to be determined by the state law.

II.

The Court of Appeals Deprived the Defendant of Its Right to a Trial by Jury by Passing Upon Issues of Credibility and Drawing Unfavorable Inferences Against the Defendant, in Arriving at Its Decision on the Merits.

This case was tried to a jury. The only evidence before the jury was that of the defendant in support of its affirmative defense. The issues presented on the merits of the case were factual issues for the jury. By its decision the Court has substituted its judgment for that of

the jury by passing on issues of credibility and by drawing unfavorable inferences from the evidence against the defendant. The principal basis for the Court's decision as appears from the opinion is the fact that it found "* * * that no oral agreement was made binding upon Central States, * * *" (R. 221).

The following portion of the Court's opinion demonstrates the action of the Court in passing on issues of credibility and drawing unfavorable inferences against the defendant:

> "Watson Brothers relies on the well known rule that it was on a motion for directed verdict entitled to the benefit of all favorable inferences arising from the facts. Assuming it was so entitled, as we think it was, it is our view that the inescapable *inferences do its position more harm than good.* For instance, if Wolfe at the time he claims to have made an oral lease with Richter thought that the latter was authorized to act for Central States, why did he insist that the agreement be signed by Lehtin? The fact that he was not willing to rely upon Richter in this respect indicates that he recognized Richter's lack of authority. More than that, so far as we can ascertain from the record, Watson Brothers first made its claim of an oral lease when its answer was filed in court on November 19, 1946. Its silence during all this time is, so we think, inconsistent with its belated contention that it was relying upon an oral lease. When Wolfe on June 8 received from McBride a letter containing Central States' proposal wholly at variance with the alleged oral lease entered into some twenty-four hours previously, *it taxes our credulity,* in the absence of any protest on his part that he believed an oral agreement binding on the parties had been consummated, and the *unfavorable inference* arising from that circumstance is enhanced by the failure of Watson Brothers to respond to or acknowledge receipt of the subsequent letters which it received from Central States. *A further inference against Watson Brothers* arises from the fact that it refused Central

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Respondent, Plaintiff.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

I. The defendant's contention that the cause became moot was, in previous proceedings on certiorari in this controversy, presented as an issue before the Supreme Court of the United States; the issue was decided against the defendant by this Court and cannot now be raised as a ground for the granting by this Court of a petition for certiorari at this time 9

II. Where the parties by stipulation in the Court of Appeals agreed to have the cause heard upon the merits by that court, the contention of the defendant that the cause had become moot was waived.. 12

III. The petitioner and defendant herein has not shown to this court or cited any authority sustaining its petition for certiorari whereby its petition falls under any of the categories as stated in Rule 38-5-b of the Rules of the Supreme Court of the United States, in which it has become customary for the Supreme Court to grant petitions for certiorari 13

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 857.

WATSON BROS. TRANSPORTATION CO., INC.,
Petitioner, Defendant,

vs.

CENTRAL STATES COOPERATIVES, INC.,
Respondent, Plaintiff.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

The defendant seeks a review of the judgment of the Court of Appeals for the Seventh Circuit, entered February 10, 1950, affirming a judgment of the District Court of the United States for the Northern District of Illinois, entered December 23, 1946, in favor of the plaintiff

and against the defendant for possession of a truck terminal located in the City of Chicago.

The original action was commenced by the plaintiff, Central States Cooperatives, Inc., a corporation of the District of Columbia, in the Municipal Court of Chicago on October 2, 1946 (R. 3, 4) against the defendant, Watson Bros. Transportation Co., Inc., a Nebraska corporation, to recover possession of certain premises in Chicago (R. 4) improved as a truck freight terminal and worth at least $100,000.00 (R. 7, 9, 23). The defendant filed its petition (R. 7) and bond (R. 23) in that court on October 15, 1946, for removal of the cause to the United States District Court for the Northern District of Illinois, Eastern Division, on the ground of diversity of citizenship (R. 7).

After the transcript of the record on removal was filed in the District Court the plaintiff filed its amended complaint (R. 40) for possession, showing that the plaintiff held over in the premises after the expiration, on September 30, 1946, of a written lease on the premises. The defendant answered on December 17, 1946 (R. 61) admitting the expiration of the written lease but claiming an oral lease from the plaintiff for the period from October 1, 1946 to June 30, 1947. Upon a hearing of the cause on December 23, 1946 (R. 82) before a jury, the court at the close of defendant's evidence sustained the plaintiff's motion for a directed verdict for the plaintiff (R. 141-145), finding the defendant guilty of unlawfully withholding from the plaintiff possession of the premises, and judgment was entered accordingly.

The defendant filed its notice of appeal on December 24th (R. 145) and supersedeas bond in the amount of $20,000.00 (R. 150) on appeal to the United States Circuit Court of Appeals for the Seventh Circuit. The record was filed in the Circuit Court of Appeals on February 1, 1947, and the parties filed their several briefs to the merits, the last of which was filed July 11, 1947.

While the appeal was pending and undisposed of on the merits, the defendant on September 23, 1947, filed in the Circuit Court of Appeals (R. 179-190) its motion to reverse the judgment of the District Court and to remand the cause to the District Court with instructions to remand the cause to the state court. The grounds of this motion were:

1. That the issues on appeal had become moot by reason of the sale of the premises by the plaintiff; and

2. That the District Court had no jurisdiction of the matter because an act of Congress granting to the United States District courts jurisdiction of suits by or against citizens of the District of Columbia, was unconstitutional.

The opinion of the Circuit Court of Appeals was filed December 12, 1947, reversing and remanding the cause with direction that the District Court remand the cause to the state court from which it was removed. (*Central States Cooperatives, Inc.* v. *Watson Bros. Transportation Co., Inc.*, 165 F. 2d 392.)

The ground of the court's decision, as appears from that opinion, was that the act of Congress in question was held to be unconstitutional.

The court was silent in its opinion concerning defendant's contention that the case was moot.

The plaintiff filed in the Supreme Court of the United States on April 17, 1948, its petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, at the October term, 1947, No. 748, seeking a review of the above mentioned decision of the Circuit Court of Appeals.

In the brief in opposition to the petition for writ of certiorari, filed by the defendant, the defendant sought to have such writ of certiorari denied on the ground that the controversy between the parties was no longer sub-

stantial, nor could the court grant the petitioner effective relief should it grant certiorari.

On June 27, 1949, this court granted the plaintiff's petition for certiorari and vacated the judgment of the Circuit Court of Appeals and remanded the said cause to that Court for further consideration in the light of *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 9511.

Thereafter, the mandate of this Court was filed in the Court of Appeals and the judgment of that court of December 12, 1947, was vacated.

Thereafter, on December 12, 1949, the parties hereto entered into a stipulation in writing filed in the Court of Appeals on December 14, 1949:

> "That the above entitled appeal may be placed upon the calendar of the court for the January term for hearing and oral argument on the merits of the appeal." (Appendix.)

On motion of the plaintiff, filed in the Court of Appeals on December 14, 1949, an order was entered by that court on December 15, 1949, as follows:

> "Pursuant to stipulation of counsel, it is ordered that this appeal be, and the same is hereby, placed on the calendar of this court for hearing and argument on the merits at some time during the January, 1950, session." (Appendix.)

The cause came on for hearing on argument on February 1, 1950 (R. 210). On the day before the hearing of said argument the defendant filed in the Court of Appeals (R. 195-209) a motion to reverse and remand the cause by reason of the fact that the issues on appeal had become moot (R. 196-197).

The attorneys for the plaintiff had no opportunity to oppose the motion except in oral argument to observe that the issue of moot question had been before the Circuit

Court of Appeals in September, 1947, and in effect had been denied by being disregarded in the opinion of the court of December 12, 1947. Further, that the same question was presented to the Supreme Court of the United States in the brief of the defendant in opposition to the petition of the plaintiff for certiorari and again had been denied by being disregarded by the Supreme Court in its opinion and decision of June 27, 1949.

The Court of Appeals, by its opinion and judgment of February 10, 1950, denied the motion of the defendant to reverse and remand the cause with instructions to the District Court to remand the cause to the state court (R. 211-216) on the ground that the question presented on the motion involved substantive rather than procedural rights and that under the laws of Illinois there were substantial questions involved and the question was not moot.

SUMMARY OF ARGUMENT.

I.

The defendant's contention that the cause became moot, in previous proceedings on certiorari in this controversy, was presented as an issue before the Supreme Court of the United States; the issue was decided against the defendant by this Court and cannot now be raised as a ground for the granting by this Court of a petition for certiorari at this time.

Corpus Juris Secundum, 50 C. J. S. 11, Sec. 592.

Postal Telegraph Cable Co. v. *City of Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

United States v. *California Bridge & Construction Co.,* 245 U. S. 337, 38 S. Ct. 91, 62 L. Ed. 332.

Edenborn v. *Blacksher,* 148 L. A. 296, 86 S. 817.

Rackley v. *Fowlkes,* 89 Tex. 613, 36 S. W. 77.

United Shoe Machinery Corp. v. *United States,* 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708.

Bates v. *Bodie,* 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444, L. R. A. 1918 C, 355.

United States v. *Ballard,* 322 U. S. 78, 64 S. Ct. 882; 88 L. Ed. 1148.

II.

Where the parties by stipulation in the Court of Appeals agreed to have the cause heard upon the merits by that court, the contention of the defendant that the cause had become moot was waived.

III.

The petitioner and defendant herein has not shown to this court or cited any authority sustaining its petition for certiorari whereby its petition falls under any of the categories as stated in Rule 38-5-b of the Rules of the Supreme Court of the United States, in which it has become customary for the Supreme Court to grant petitions for certiorari.

Danovitz v. *United States,* 281 U. S. 389, 50 S. Ct. 344, 74 L. Ed. 606.

United States v. *Johnston,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

United States v. *Sacony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, rehearing denied, 310 U. S. 658, 60 S. Ct. 1091, 84 L. Ed. 421.

Goodyear Tire & Rubber Co. v. *Ray-O-Vac,* 321 U. S. 275, 64 S. Ct. 593, 88 L. Ed. 721.

Palmer v. *Hoffman,* 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719, rehearing denied, 318 U. S. 800, 63 S. Ct. 757, 87 L. Ed. 1163.

State of Ohio ex rel. Seney v. *Swift & Co.,* 260 U. S. 146, 43 S. Ct. 22, 67 L. Ed. 176.

Ex Parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 45, 35 L. Ed. 868.

Houston Oil Co. v. *Goodrich,* 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

Rule 38, Sub-paragraph 5-b.

IV.

The controversy between the parties hereto had not become moot at the time of the decision of the Court of Appeals on February 10, 1950, and up to that time there existed a real and undetermined controversy involving substantial rights between the parties under the laws of the State of Illinois.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

Bell v. *Bruhn*, 30 Ill. App. 300, 301.

Daggitt v. *Mensch*, 41 Ill. App. 403, 405, affirmed 141 Ill. 395, 31 N. E. 153.

Hickox v. *Armstrong*, 181 Ill. App. 107, 109.

Patterson v. *Graham*, 40 Ill. App. 399, 404, affirmed 140 Ill. 531, 30 N. E. 460.

Johnson v. *Shinkle*, 50 Ill. 137, 138.

Mills v. *Graves*, 44 Ill. 50, 51.

Golden v. *Menker*, 132 Ill. App. 25, 29.

Glanz v. *Ziabek*, 233 Ill. 22, 25, 84 N. E. 36.

Hammond v. *Doty*, 184 Ill. 246, 56 N. E. 371.

Palmer v. *Frank*, 169 Ill. 90, 48 N. E. 426.

Smith v. *Hollenback*, 51 Ill. 223.

Pearson v. *Herr*, 53 Ill. 144.

Hooper v. *Buvidas*, 239 Ill. App. 596.

Stoddard v. *Illinois Improvement & Ballast Co.*, 271 Ill. 98, 110 N. E. 870.

West Side Trust & Savings Bank v. *Lopoten*, 358 Ill. 631, 193 N. E. 462.

ARGUMENT.

I.

The defendant's contention that the cause became moot was, in previous proceedings on certiorari in this controversy, presented as an issue before the Supreme Court of the United States; the issue was decided against the defendant by this Court and cannot now be raised as a ground for the granting by this Court of a petition for certiorari at this time.

It will be seen by an examination of the brief in opposition to petition for certiorari (pages 4, and 6 to 12), filed by the defendant herein in response to the plaintiff's petition for certiorari filed in this Court to the October term, 1947, No. 748, that the identical issue as to whether the cause had become moot, was submitted to the Supreme Court of the United States for decision. The defendant sought, by contending that the issues had become moot, to prevent the allowance by this Court of the plaintiff's petition for certiorari to review the judgment of the Circuit Court of Appeals, reversing the judgment of the trial court in favor of the plaintiff for possession of the premises. This Court by granting the plaintiff's petition for certiorari in said cause and reversing the judgment of the Circuit Court of Appeals, decided that issue by disregarding the point, as to whether the case was moot, in favor of the plaintiff in this cause and respondent to the present petition for certiorari. By reason thereof, the defendant and petitioner herein is not entitled the second time to present the same issue to the Court for decision.

Quoting from Corpus Juris Secundum, 50 C. J. S. 11, Sec. 592:

"The doctrine of *res judicata*, first definitely formulated in the *Duchess of Kingston's* case, embodies two main rules which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, * * * (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same, * * *. These rules afford a logical and convenient method of dividing the numerous cases falling within the principle of *res judicata*.

"*Res judicata* is a rule of universal law pervading every well regulated system of jurisprudence, and is put on two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation—interest *republicae ut sit finis litium;* the other, the hardship on the individual that he should be vexed twice for the same cause —*nemo debet bis vexari pro eadem causa.* The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided."

This familiar doctrine has been recognized and upheld by the Supreme Court of the United States in the following cases: *Postal Telegraph Cable Co.* v. *City of Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215; *United States* v. *California Bridge & Construction Co.,* 245 U. S. 337, 38 S. Ct. 91, 62 L. Ed. 332.

It has further been recognized that the legal effect of the silence of a judgment on any part of a demand that might have been allowed, is a rejection of such part of the demand, which has the effect of *res judicata* against a subsequent action for that part. *Edenborn* v. *Blacksher*, 148 L. A. 296, 86 S. 817; *Rackley* v. *Fowlkes*, 89 Tex. 613, 36 S. W. 77; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708; *Bates* v. *Bodie*, 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444, L. R. A. 1918 C, 355.

To support further our point that the contention of the defendant as to the cause becoming moot was before the Supreme Court on the previous certiorari, we wish to refer to the cause of *United States* v. *Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148, wherein it was held that on certiorari respondents may urge in support of the judgment of the Circuit Court of Appeals, grounds not reached by said court by reason of the disposition of the entire case upon a ground erroneously believed to require such action. In other words, by the defendant's brief in opposition to the previous petition for certiorari in this cause, the defendant contended that even were the Circuit Court of Appeals in error in holding the act of Congress in question unconstitutional, nevertheless, the Supreme Court ought to have denied the plaintiff's previous petition for certiorari because the controversy had become moot. That issue, therefore, was before the Supreme Court of the United States in the previous certiorari proceedings.

The plaintiff and respondent respectfully submits that this Court, having once had before it the issue of whether the cause had become moot and having decided by its previous judgment against the defendant's contention in that regard, the defendant and petitioner ought not to be permitted to urge the same contention upon the Court as a ground for granting the present petition for certiorari.

II.

Where the parties by stipulation in the Court of Appeals agreed to have the cause heard upon the merits by that court, the contention of the defendant that the cause had become moot was waived.

The merits of the appeal taken by the defendant from the judgment of the district court in favor of the plaintiff as to the plaintiff's right of possession of the premises in question, involved the issue whether upon the facts appearing from the admissions in the pleadings and the evidence in the trial court, the plaintiff was entitled to a judgment for possession of the premises. The merits of this case did not involve the question as to whether the cause subsequently became moot. The act of the defendant in entering into the stipulation in the Court of Appeals for the presentation of the cause upon the merits, constituted a recognition by the defendant that the defendant had been overruled by the Supreme Court of the United States in its contention that the cause had become moot. After this stipulation, the defendant was no longer entitled to bring before the court the question, as to whether the cause had become moot. The defendant sought belatedly to raise again this question on the day preceding that on which the Court of Appeals heard the cause on argument on the merits. In so doing the defendant, in all probability, exhibited its concern that its cause was hopeless on the merits, as indeed the Court of Appeals in its opinion demonstrated. The defendant having waived, by its stipulation in the Court of Appeals, the contention that the cause was moot, the defendant is not entitled to urge such contention upon this Court in its present petition for writ of certiorari.

III.

The petitioner and defendant herein has not shown to this court or cited any authority sustaining its petition for certiorari whereby its petition falls under any of the categories as stated in Rule 38-5-b of the Rules of the Supreme Court of the United States, in which it has become customary for the Supreme Court to grant petitions for certiorari.

It is significant that the petitioner has not been able to refer the Court to any case in which the Supreme Court of the United States has granted certiorari upon issues of import similar to those raised by the petitioner in its petition herein. The petitioner does nothing more than to cite the act of Congress granting to this Court discretion to allow a writ of certiorari, and has made no effort to show that this cause falls under any of the classifications suggested by Rule 38-5-b of the rules of this court.

The issue in the trial court was principally one of fact as to whether the defendant had produced sufficient evidence to establish its defense of oral lease and a question of law as to whether the oral lease claimed by the defendant fell within the Statute of Frauds. Such facts are not usually considered by the Supreme Court of the United States as such issues justifying the granting of a petition for certiorari. For instance, in *Danovitz* v. *United States*, 281 U. S. 389, 50 S. Ct. 344, 74 L. Ed. 606, the sufficiency and effect of evidence were held not reviewable on certiorari. Likewise, in *United States* v. *Johnston*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925, it was held that the Supreme Court does not grant certiorari to the Court of Appeals to review evidence and to discuss specific facts.

Further, in *United States* v. *Sacony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, rehearing de-

nied, 310 U. S. 658, 60 S. Ct. 1091, 84 L. Ed. 421, it was held that the denial of a motion for new trial on the ground that the verdict was against the weight of the evidence, is not subject to review by the United States Supreme Court.

In *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 64 S. Ct. 593, 88 L. Ed. 721, it was held that it must be a strong case in which the Supreme Court will set aside concurrent findings of the District Court and the Court of Appeals on question of fact.

The question in the trial court was whether, under the laws of the State of Illinois, where the contractual relations between the parties, if any, were entered into, and where the property in question is located, the plaintiff was entitled to possession of the premises.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719, rehearing denied, 318 U. S. 800, 63 S. Ct. 757, 87 L. Ed. 1163, it was held that where lower federal courts are applying local law, the Supreme Court will not set aside a ruling except on a plain showing of error.

It is a principle long recognized by the court that writs of certiorari to review judgments of courts of appeal are only granted under special circumstances. *State of Ohio ex rel. Seney* v. *Swift & Co.*, 260 U. S. 146, 43 S. Ct. 22, 67 L. Ed. 176.

It has also been held by a long line of decisions of the Supreme Court that jurisdiction to review by certiorari should be sparingly exercised and only in cases of peculiar gravity and general importance. *Ex parte Lau Ow Bew*, 141 U. S. 583, 12 S. Ct. 45, 35 L. Ed. 868; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

We respectfully submit that this case is not one proper for the exercise of the discretionary power of the Court to grant certiorari.

IV.

The controversy between the parties hereto had not become moot at the time of the decision of the Court of Appeals on February 10, 1950, and up to that time there existed a real and undetermined controversy involving substantial rights between the parties under the laws of the State of Illinois.

Maintaining the validity of the judgment of the District Court as a final adjudication of the plaintiff's right of possession at the time of the commencement of the suit, is essential in subsequent litigation between the parties. This right and the right to recover on the appeal bond filed by the defendant in the district court to obtain a supersedeas, were existing and substantial rights the plaintiff was seeking to protect by urging the Court of Appeals to affirm the judgment of the District Court. Furthermore, as appears from the record in this cause, the plaintiff had conveyed title to the premises by warranty deed under and by virtue of which it became obligated to maintain at law its right to possession of the premises for the benefit of its grantee, which involved continuing rights and obligations, which in no sense had become moot.

The substantive rights of the parties to this cause are determined by the laws of the State of Illinois, where the property in question is located, and where the contractual relations between the parties, if any, were entered into. In *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, the court said at page 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not

a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *"

The case of *Heitmuller* v. *Stokes,* 256 U. S. 359, relied upon by the defendant to establish that the case had become moot and also relied upon by the defendant seeking to have the court deny the previous petition for certiorari, is clearly not in point. In the first place, the *Heitmuller* case arose in the District of Columbia and no question arose as to the applicability of the law of any state. In the case at bar, the substantive rights of the plaintiff to obtain and maintain the validity of the judgment for possession must necessarily be determined by the laws of Illinois, for the important reasons assigned in the above referred to case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. In the second place, in that case one Stokes, who had sued and obtained the judgment for possession against one Heitmuller, moved, as defendant in error, in the Supreme Court, to dismiss the writ of error, representing to the court that his cause of action had ceased to exist and that he was no longer entitled to the relief sought, namely, the possession of the premises, by reason of his sale of the premises. No appeal bond had been filed in that case by the appellant. In the case at bar, the plaintiff, Central States Cooperative, Inc., has not represented to the Court that it no longer has any substantial rights in controversy, but quite to the contrary is urging with all the force at its command that there are substantial rights at stake which it has sought to and has successfully defended before the Court of Appeals in securing the affirmance of the judgment of the District Court.

Furthermore, the defendant in this case was able to maintain and enjoy the benefit of possession of the premises in question by reason of its having filed a supersedeas bond and now seeks to avoid liability upon the bond by pretending that the plaintiff no longer has any rights involved in this litigation.

In addition thereto, we wish to observe that although the Supreme Court in the *Heitmuller* case, because of the action of the plaintiff Stokes in seeking to abandon the litigation, held that there was no longer any substantial issue before the Court, nevertheless it did not hold that in all such similar cases the judgment for possession of the trial court ought to be reversed but said on page 362:

> "It remains to be considered what order should be made. Although, owing to the moot character of the issue involved, we may not consider the merits, we are at liberty to make such order as is 'most consonant to justice in view of the conditions and circumstances of the particular case.' *United States* v. *Hamburg-American Co.*, 39 U. S. 466, 477, 478."

In the case at bar, since it is the defendant, not the plaintiff, which has sought the end of the litigation, the order most consonant to justice would be the affirmance of the judgment of the District Court. This is exactly what the Court of Appeals did.

For the reasons above stated we believe it is clear that the defendant in this case is not entitled to rely upon the *Heitmuller* case in support of its contention that the Court of Appeals ought to have reversed the judgment of the district court.

In the circumstances of the case at bar the question of the right of the plaintiff to the possession of the premises on October 2, 1946, when the suit was brought, was still a matter of important substantive rights between the parties under the laws of the State of Illinois, when the mat-

ter was on hearing on the merits on the appeal before the Court of Appeals.

The issue before the trial court was the plaintiff's right to possession at the time of the commencement of the suit on October 2, 1946. The judgment entered on December 23, 1946 adjudicated the plaintiff's right to possession of the premises on the date of the commencement of the suit. Such issue was still the principal issue on the merits of this case, and was the right which the plaintiff was defending as appellee in the Court of Appeals. It is the rule in Illinois that a conveyance by the plaintiff, in a suit for possession of certain property, will not defeat the plaintiff's right to maintain the validity of its judgment for possession against reversal on appeal.

In *Bell* v. *Bruhn,* 30 Ill. App. 300, the court says, page 301:

> "After the suit was commenced, the appellee conveyed the premises, so that his right to the possession had terminated *pendente lite.* He was, however, at the commencement of the suit, entitled to the possession and his recovery inures to the benefit of his grantee. So held in ejectment; *Mills* v. *Graves,* 44 Ill. 50; and one of the reasons there assigned is that it is the policy of this State to promote the easy sale and conveyance of land, and not to prevent such conveyance during the long period which may be consumed in litigation. That reason applies to suits of this character with, at least, part of the force that it does to ejectment. No good would result from a contrary doctrine."

In *Daggitt* v. *Mensch,* 41 Ill. App. 403, affirmed 141 Ill. 395, 31 N. E. 153, the court said, page 405:

> "We have held that a conveyance *pendente lite* by the plaintiff in an action of forcible detainer, does not affect his right to recover, if at the commencement of the suit he was entitled to the possession. *Bell* v. *Bruhn,* 30 Ill. App. 300. And the same result attends

any change of possession. *Patterson* v. *Graham,* 40 Ill. App. 399."

In *Hickox* v. *Armstrong,* 181 Ill. App. 107, the court says at page 109:

"The law is well settled in this state, that where the possession of property is delivered to the plaintiff in an action of forcible detainer, after the institution of the suit, in the absence of proof of settlement, the plaintiff may still prosecute the action to judgment."

In *Patterson* v. *Graham,* 40 Ill. App. 399, affirmed 140 Ill. 531, 30 N. E. 460, the court said, page 404:

"It is also contended that appellee had no right to a judgment, for the reason that while the action was pending, the possesion of the premises was delivered up by the delivery of the key thereof to appellee's counsel. There is no evidence that the key was offered or received as a compromise of the forcible detainer proceeding, and without such intention, receiving a surrender of premises pending such a proceeding, would not terminate the suit. The proceeding is to determine plaintiff's right to the possession at the time it was commenced, and he could not assert in the case a right to possession, which did not accrue until after the action was begun. The judgment relates to the right of possession, which was claimed when the proceeding was instituted, and it is for the withholding of the possession against such right wrongfully that the signers of the appeal bond became liable. A plaintiff has the right to pursue his proceeding to judgment, after he has, pending the action, obtained possession, for the purpose of fixing liability on the appeal bond for the wrongful detention of the premises. *Bell* v. *Bruhn,* 30 Ill. App. 300."

The same rule has applied in Illinois to actions of ejectment. In *Johnson* v. *Shinkle,* 50 Ill. 137, an action of ejectment was commenced and it appeared that subsequent to the filing of the suit, the plaintiff had sold and

conveyed the land in controversy. The defendant objected that the plaintiff was no longer entitled to the premises. The court said, page 138:

> "The question presented by this record was decided at the April term, 1867, in *Mills* v. *Graves,* 44 Ill. 50. We there held that a conveyance by the plaintiff in an action of ejectment, pending the suit, would not defeat his right of recovery, which would inure to the benefit of his grantee.
>
> "The circuit court should have rendered a judgment for the recovery of the possession, and that the plaintiff have his writ of *habere facias possessionem.*"

In *Mills* v. *Graves,* 44 Ill. 50, the court says, page 51:

> "It cannot have been the intention of the legislature to prevent the conveyance of lands during the long period through which the plaintiff in ejectment may often be kept in the courts, although the owner of a clear paramount title; and this may be asserted with the more confidence in view of our short statutes of limitation, under whose operation the grantee of a plaintiff in ejectment, or a purchaser under judgment and execution against the plaintiff, might be often barred from prosecuting a new suit. Neither can we discover any practical objection to allowing a plaintiff in ejectment to recover, notwithstanding a conveyance pending the suit. The recovery would be under the title upon which the suit was brought, and would practically inure to the benefit of his grantee. To allow the recovery would also be in strict conformity to the issue made by the pleadings."

In *Golden* v. *Menker,* 132 Ill. App. 25, on page 29 the court says:

> "Certain questions were asked the witness Clemens by appellant's attorney, on cross-examination, for the purpose, as is indicated by the argument of appellant's counsel, of providing that appellee, at the time of the trial, was not entitled to possession of the premises. Objections to these questions were properly

sustained. The material question was, whether appellee was entitled to possession when he brought suit, and notwithstanding he may have conveyed all his interest to a third person after suit brought, the suit might properly proceed to judgment in his name for the benefit of his grantee. *Bell* v. *Bruhn*, 30 Ill. App. 300; *Daggitt* v. *Mensch*, 41 *id.* 403."

In *Glanz* v. *Ziabek*, 233 Ill. 22, 84 N. E. 36, on page 25 the court says:

"It is further contended that since the commencement of this suit the plaintiffs have conveyed said premises, and that fact alone, it is said, is a bar to plaintiffs' right to recover. In *Mills* v. *Graves*, 44 Ill. 50, this court held that it was sufficient for the plaintiff to show, in ejectment, that he was entitled to recover the premises sued for at the time of the commencement of the suit, and that a conveyance to a third party by a plaintiff, pending the action, would not defeat the action, and that a recovery by the plaintiff in such case would inure to the benefit of his grantee. The doctrine of that case was approved in *Johnson* v. *Shinkle*, 50 Ill. 137, and in *Converse* v. *Dunn*, 166 *id.* 25, and is the settled law of this State."

Moreover, in an action of forcible detainer, under the statutes of the State of Illinois (Ill. Rev. Stat. 1945, Chap. 57, Sec. 2), as was held in *Hammond* v. *Doty*, 184 Ill. 246, 56 N. E. 371, only the immediate right of possession is involved and the title to the premises cannot be called in question.

In *Palmer* v. *Frank*, 169 Ill. 90, 48 N. E. 426, the court held that the defendant must not attempt to try title but must attack the plaintiff's right to possession. It has been further held in a number of Illinois cases that the question in an action of forcible detainer is not in whom is the title to the premises, but is one of possession and the right to possession. *Smith* v. *Hollenback*, 51 Ill. 223; *Pearson* v. *Herr*, 53 Ill. 144; *Hooper* v. *Buvidas*, 239 Ill. App. 596.

It was further held in *Stoddard* v. *Illinois Improvement & Ballast Co.*, 271 Ill. 98, 110 N. E. 870, that a freehold was not involved in a case of forcible entry and detainer. It has also been held in *West Side Trust & Savings Bank* v. *Lopoten*, 358 Ill. 631, 193 N. E. 462, that the right to possession is all that is involved or can be determined in proceedings under the forcible entry and detainer act of the State of Illinois.

The mere fact that the defendant has shown that the plaintiff has conveyed the premises in question and that the grantee of the plaintiff has belatedly been admitted by the defendant to possession of the premises, ought not deprive the plaintiff of its right to maintain on appeal the validity of the judgment previously rendered in favor of the plaintiff for possession of the premises. Moreover, the defendant is liable upon its appeal bond for the payment to the plaintiff of the reasonable rental value of said premises, damages and costs during the period when the defendant unlawfully detained possession of the premises from the plaintiff, for which to date the defendant has paid to the plaintiff nothing.

In a suit now pending in the said court by the plaintiff in this case against the defendant, for the reasonable rental value of the premises and damages during the wrongful detention (R. 200), the adjudication by the District Court that the plaintiff was entitled to possession of the premises on October 2, 1946, is a vital point of substantive right, the effect of which determination the defendant is now seeking to escape.

We submit that the reasoning of the Court of Appeals, that substantial questions of substantive right were involved under the laws of the State of Illinois, was sound (R. 215-217).

The Court of Appeals in its opinion further recognized, we submit quite properly, that substantial rights of the

plaintiff were involved by reason of the $20,000.00 supersedeas bond, which the defendant had filed in order to prevent the execution of the judgment for possession (R. 213-214).

We believe that the plaintiff and respondent is entitled to observe that it would be a travesty on justice and an abuse of the process of the federal courts, if the defendant could by the very delays occasioned by the defendant in these proceedings, defeat the substantial rights of the plaintiff; if the decedent can have compelled the plaintiff to bear the heavy financial burdens of the premises while escaping liability on its appeal bond; and if it can have compelled the plaintiff not to have conveyed the premises on pain of the reversal of the judgment of the trial court. It would seem to the plaintiff a strange conclusion of the case, after the plaintiff had obtained a judgment for possession, were such judgment vacated and the suit dismissed because later the plaintiff conveyed title to its property. The plaintiff went to great pains and expense to secure an adjudication of the trial court that it was entitled to possession of the premises on October 2, 1946. The defendant has shown no reason why the plaintiff should not have and be entitled to the benefit of such adjudication. The plaintiff, therefore, respectfully submits that under the laws of the State of Illinois and the facts of this case, the issues in this cause had not become moot, and that there were substantial issues which were still the subject matter of this litigation, when the case was on hearing on the merits before the Court of Appeals.

Conclusion.

It is, therefore, respectfully submitted that by reason of the foregoing the defendant's petition for writ of certiorari ought to be denied.

Respectfully submitted,

THOMAS G. MCBRIDE,
Counsel for plaintiff and respondent.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 9291

CENTRAL STATES COOPERATIVES, INC., *Plaintiff-Appellee,* vs. WATSON BROS. TRANSPORTATION CO., INC., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. — Honorable Elwyn R. Shaw, District Judge.

NOTICE.

To: Julius L. Sherwin, Esq.,
Theodore R. Sherwin, Esq.,
209 South La Salle Street,
Chicago 4, Illinois,
Attorneys for Defendant-Appellant.

PLEASE TAKE NOTICE that on Wednesday, December 14, 1949, we will file in the office of the Clerk of the United States Court of Appeals, for the Seventh Circuit, a motion, together with a brief and stipulation in support of the motion, copies of which motion, brief and stipulation are herewith served upon you.

(Signed) THOMAS G. MCBRIDE,
THOMAS G. MCBRIDE,
Attorney for Plaintiff-Appellee.

Received a copy of the above and foregoing notice, together with a copy of each of the motion, brief and stipulation therein referred to this 13th day of December, 1949.

(Signed) JULIUS L. SHERWIN,
(Signed) THEODORE R. SHERWIN,
Attorneys for Defendant-Appellant.

MOTION.

Now comes Central States Cooperatives, Inc., Plaintiff-Appellee, by Thomas G. McBride, its attorney and moves the Court to place the above entitled cause upon the January Calendar of this Court for hearing and oral argument on the merits of the appeal, in support of which the Plaintiff-Appellee submits its brief or suggestions, and stipulation of the parties, attached hereto.

Respectfully submitted,

(Signed) THOMAS G. MCBRIDE,
THOMAS G. MCBRIDE,
Attorney for Plaintiff-Appellee.

BRIEF.

Now comes Central States Cooperatives, Inc., Plaintiff-Appellee, by Thomas G. McBride, its attorney, and respectfully represents to this court as follows:

On September 23, 1947 the Defendant-Appellant filed in this cause a motion for the entry of an order reversing the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, in this cause appealed from and remanding the cause to the District Court with instructions to dismiss the complaint or remand the cause to the state court.

In response to this motion, this Court on December 12, 1947 filed its opinion and entered judgment reversing and remanding the cause with directions that the District Court remand the cause to the state court from which it was removed.

A petition for certiorari was filed by the defendant in due time in the Supreme Court of the United States in pursuance of which the Supreme Court of the United States on June 27, 1949 entered the following order:

> "*Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further consideration in the light of *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, No. 29, October Term, 1948, decided June 20, 1949."

A mandate of the Supreme Court of the United States, in pursuance of its judgment of June 27, 1949, was filed in the office of the Clerk of this Court on August 13, 1949, in pursuance of which on September 14, 1949 an order was entered by this Court that the judgment of this Court, which was entered in this cause on December 12, 1947 be and the same is hereby vacated.

The motion of the Defendant-Appellant of September 23, 1947 anticipated and precluded a hearing upon the merits of the above entitled cause until the final disposition of such motion as hereinabove set forth. The merits of the Defendant's appeal, therefore, have not been heard by this Court and the above entitled appeal is still pending and undisposed of in this Court.

A stipulation has been entered into between the parties to this appeal to the effect that the above entitled appeal may be placed upon the Calendar of the Court for the January term, for hearing and oral argument on the merits of the appeal.

Respectfully submitted,

CENTRAL STATES COOPERATIVES, INC.,
Plaintiff-Appellant.

By (Signed) THOMAS G. MCBRIDE,
THOMAS G. MCBRIDE,
Its Attorney.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Thomas G. McBride, being first duly sworn, on oath deposes and says that he has prepared the above and foregoing brief and suggestions in support of the motion of the Plaintiff-Appellee to set the cause of hearing and oral argument upon the merits; that the affiant is familiar with the foregoing brief, that the statements of facts therein contained are true in substance and in fact.

(Signed) THOMAS G. MCBRIDE.
THOMAS G. MCBRIDE.

Subscribed and sworn to before me this 12th day of December, 1949.

(Signed) COLETTE DIVER,
(CORPORATE SEAL) *Notary Public.*

STIPULATION.

IT IS STIPULATED by the parties hereto by their respective attorneys of record that the above entitled appeal may be placed upon the calendar of the Court for the January Term for hearing and oral argument on the merits of the appeal.

Dated at Chicago, Illinois, this 12th day of December, 1949.

(Signed) THOMAS G. MCBRIDE,
Attorney for Plaintiff and Appellee.

(Signed) JULIUS L. SHERWIN,
(Signed) THEODORE R. SHERWIN,
Attorneys for Defendant and Appellant.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,
Chicago 10, Illinois.

December 15, 1949.

Before
Hon. J. EARL MAJOR, *Chief Judge*

CENTRAL STATES COOPERATIVES, INC., *Plaintiff-Appellee,* vs. WATSON BROS. TRANSPORTATION CO., INC., *Defendant-Appellant.* No. 9291	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Pursuant to stipulation of counsel, it is ordered that this appeal be, and the same is hereby, placed upon the calendar of this Court for hearing and argument on the merits at some time during the January, 1950 Session.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of a notice, motion, brief in support and stipulation of the parties to have cause placed on calendar for oral argument, filed December 14, 1949, and an order of this Court, entered December 15, 1949, in

CAUSE No. 9291.

CENTRAL STATES COOPERATIVES, INC.,
Plaintiff-Appellee,

vs.

WATSON BROTHERS TRANSPORTATION COMPANY, INC.,
Defendant-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this ..... day of ....., A. D. 1950

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.